Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 83-116

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

KAHLIL T. SHAHEED,
Petitioner,

v.

ADAM METAL SUPPLY, INC.
KENNETH R. LALLY,
Individually and as President of
ADAM METAL SUPPLY, INC.
and
ALUMINUM COMPANY OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondents' Brief In Opposition And Appendix

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QUESTIONS PRESENTED

1. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE EXTENT TO WHICH AN EMPLOYER MAY RELY ON STATEMENTS MADE IN AN EEOC PROCEEDING AS THE BASIS FOR DISCHARGE.
2. PETITIONER WAS AFFORDED A REASONABLE OPPORTUNITY TO CROSS-EXAMINE LALLY.
3. THE AWARD OF ATTORNEY'S FEES TO ALCOA WAS NOT AN ABUSE OF DISCRETION.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

All parties to the proceedings are named in the caption of this brief.

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1. Respondent's Appendix is herein referenced as "RA". Respondent's Appendix is included herein beginning at 1A.

2. Petitioner's Appendix, found at the back of the Petition for Writ of Certiorari, is referenced herein as "Pa".

COUNTERSTATEMENT OF THE CASE

a) Litigation History

In this action, Petitioner, Kahlil T. Shaheed, alleges that his former employer, Adam Metal Supply, Inc. ("Adam Metal"), its Chief Executive Officer, Kenneth R. Lally ("Lally") and his former employer's sole stockholder, Aluminum Company of America ("Alcoa") discharged him in retaliation for his having filed a charge of discrimination with the Equal Employment Opportunity Commission against Adam Metal. (The charge filed with the EEOC did not name Lally or Alcoa. Shaheed's charge resulted in a finding of no probable cause by the EEOC.) The present suit charges that Petitioner's discharge violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000 *et seq*; 42 U.S.C. §1981; the Thirteenth Amendment to the United States Constitution; and the law against discrimination of the State of New Jersey, N.J.S.A. 10:5-1 *et seq*. Shaheed's suit was filed in United States District Court in Newark on June 10, 1981, naming Adam Metal and Lally as Defendants. Shaheed ar ended his Complaint on June 29, 1981, adding Alcoa as a Party Defendant.

The action was tried without a jury before the Honorable H. Curtis Meanor, United States District Judge, in Newark, New Jersey, on March 10, 11, 12, 15 and 19, 1982. Summary judgment was granted to Alcoa on the first day of trial prior to the beginning of testimony. Judgment for Adam Metal and Lally and an award of attorney's fees to Alcoa were entered at the conclusion of the trial via a bench decision. Petitioner appealed all of the foregoing rulings to the Third Circuit Court of Appeals,

which court affirmed the judgment of the District Court, without opinion.

b) The Facts

Adam Metal hired Shaheed on May 30, 1979, as a truck driver at its Elizabeth, New Jersey warehouse. Shaheed was employed by Adam Metal for approximately eleven months and during that time period he established a work record that clearly reflected his poor performance. Shaheed's personnel file is replete with instances of violations of company policies, particularly in the area of job performance. (See Appendix to Petitioner's Memorandum at 6Pa - 11Pa which details seven instances of poor work performance by Petitioner Shaheed which were relied upon by Judge Meanor in his decision that Shaheed was terminated for legitimate, nondiscriminatory reasons.)

On Friday, April 18, 1980, Shaheed reported to work and examined the manifest on which the daily routes were listed. Shaheed was assigned to a New York City route that day (1RA). Shaheed had previously expressed his dislike for the New York City routes (3RA - 5RA). After reviewing his scheduled run, he announced to the receiving clerk that he was sick and was going home (1-2RA). Adam Metal considered this conduct to be a refusal of an assignment, which constituted grounds for immediate discharge under the terms of its labor agreement since punching in and looking at one's manifest is generally considered to be an acceptance of that day's work (5RA). When this incident was brought to the attention of Defendant Lally, he reviewed Shaheed's personnel file in total for the first time. That same day, Lally

wrote a letter to Shaheed informing him that an investigation was being made into his conduct and stated that Shaheed "may be subject to disciplinary action which may include suspension or discharge." As part of his investigation, Lally sought to determine through witnesses whether or not Shaheed had actually examined the manifest routes before stating he was ill. Lally had received reports that Shaheed had examined the manifest and he wished to confirm the same. None of the drivers Lally spoke to on Friday, April 18, could attest to this fact. Lally made the decision on that same Friday to terminate Shaheed if it could be established that he had examined the manifest route prior to his claim of illness. Lally planned to interview those truck drivers who had been present on the morning of April 18, but who had left their routes prior to his investigation (5RA - 6RA).

In the morning of the next regular workday, April 21, Lally attended an EEOC fact finding conference that had been previously scheduled in regard to Shaheed's charge of racial harassment against Adam Metal which was filed on September 17, 1979. (The EEOC subsequently issued a finding of no probable cause in regard to Mr. Shaheed's charge). Prior to the beginning of the EEOC conference, the EEOC investigator who was handling Shaheed's charge was advised of the incident of April 18 and of Mr. Lally's investigation and the possibility of discipline, including discharge, that could result from Mr. Lally's investigation (6RA - 7RA). In addition, Shaheed was advised at that same conference, prior to his making any statements, that his conduct of April 18 was under investigation and that suspension and discharge were possible consequences. Upon returning from the

EEOC conference, Mr. Lally interviewed a union truck driver of Adam Metal by the name of Bill Magyaritis. Mr. Magyaritis had left for his run on April 18 at the time Mr. Lally attempted to interview the truck drivers. Mr. Magyaritis informed Lally that he had seen Shaheed reviewing the manifest prior to Shaheed's complaint of illness the prior Friday. Upon receipt of this information, Lally carried through with his previous decision to terminate Shaheed's employment with Adam Metal. A written termination notice was given to Shaheed on April 22, 1980, which was Shaheed's first day of work after having left due to his claim of illness.

On May 5, 1980, Petitioner filed a second EEOC charge against Adam Metal alleging that he had been discriminatorily discharged in retaliation for his prior charge and for statements made at the EEOC conference of April 21. Neither Lally nor Alcoa were named as respondents in that charge. The EEOC made no findings relative to that charge because Petitioner requested a Right to Sue Letter upon the expiration of 180 days.

Shaheed also filed a grievance under the terms of the collective bargaining agreement between Adam Metal and Local 478 of the Teamsters Union. On November 25, 1980, Mr. Shaheed's grievance was heard by Arbitrator Joseph A. Wildebush, and Mr. Wildebush issued a written opinion in which he stated, in part:

> The grievant had established a very poor overall record in the short time in which he was employed by the company. In coming to a decision to discharge the grievant, the company stated that it took the grievant's entire record into consideration. The key incident involved in this case occurred on April 18,

1980. The evidence is quite clear that the grievant did not like the New York City run despite his testimony to the contrary.

Mr. Wildebush further stated:

> The total record of the grievant in his short period of employment can hardly be called that of a model employee.
>
> The discharge of Kahlil T. Shaheed was for just cause and the grievance is denied.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuits Regarding The Extent To Which An Employer May Rely On Statements Made In An EEOC Proceeding As The Basis For Discharging An Employee.

Petitioner alleges that the reason for his discharge, in whole or in part, was because of statements that he made at the EEOC fact-finding conference on April 21, 1980. Petitioner would further have this Court believe that the District Court and the Third Circuit Court of Appeals so ruled. The Petitioner's allegations are simply not justified by the record.

The Court of Appeals for the Third Circuit properly affirmed the District Court's judgment. The District Court applied the proper legal standards in determining that Petitioner was not discharged in retaliation for statements made at the EEOC fact-finding conference. The findings of fact and conclusions of law made by the District Court are supported by the record below. It is clear that Petitioner's dispute is not with the legal standards employed, but with the factual determination that no retaliation took place.

This Court has emphasized repeatedly that, with regard to review of findings of fact, appellate courts are bound by the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). Rule 52(a) states that "findings of fact shall

not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This Rule "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. at 287. Rather, Rule 52(a) governs the appellate court's review of all factual findings because the district court judge has the unique opportunity to evaluate the credibility of witnesses and to weigh the evidence. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. at 855.

Since the trial court judge is in a superior position to appraise the evidence, "appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court... is circumscribed by the deference it must give to decisions of the trier of the fact . . . ." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. at 123. Based upon these principles, this Court has recognized that the proper inquiry for a reviewing court under Rule 52(a) "is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' " *Id.* (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Petitioner would have this Court ignore the principles set forth above and substitute its judgment on the facts of this case for the judgment of the trial judge.

After plaintiff extablished a *prima facie* case, Judge Meanor properly placed the burden upon the defendants

to articulate a legitimate nonretaliatory reason for discharging plaintiff. Once the defendants met that burden, Judge Meanor found that plaintiff failed to prove by a preponderance of the evidence that the articulated reason was a pretext. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Company v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Judge Meanor found that "the defendant in my judgment, has advanced legitimate reasons based on plaintiff's employment file, including the arbitrator's finding, for discharging the plaintiff" (5Pa). Judge Meanor further stated that "defendants have demonstrated, I think, legitimate nonretaliatory reasons for discharging the plaintiff," (6Pa) and "a picture still emerges of a careless, irrascible employee who was no asset to the company and did not reflect well upon Adam Metal" (8Pa). In assessing the credibility of the witnesses, the trial court stated "[h]is [Lally's] specific denial that plaintiff's participation in the EEOC played any part in his decision is credible in light of the factors stated to have been considered in the discharge determination" (10Pa). Based on all the foregoing, the trial judge ruled as follows: "I find that plaintiff has failed to demonstrate by a preponderance of the evidence that defendants' legitimate nonretaliatory reasons for discharging him were pretextual. . . " (15Pa).

The District Court correctly set forth the legal standard by which retaliation claims should be judged. Following the requirements of *Goodwin v. City of Pittsburgh*, 480 F.Supp. 627 (W.D. Pa. 1979), affirmed 624 F.2d 1090 (3d Cir. 1980), the trial judge stated:

> Under this decision, if retaliation played a part even though it may not have been the sole reason for discharge, plaintiff has made a case entitling him to relief.
>
> The criterion is whether retaliation was a determinative factor, not the determinative factor.
>
> And, as I said, it makes no difference whether there were other bases for the discharge. If retaliation was a factor, plaintiff is entitled to succeed (5Pa).

See also Womack v. Munson, 619 F.2d 1229 (8th Cir. 1980) and *Mead v. U.S. Fidelity*, 442 F.Supp. 114 (D.Minn. 1977) as to the propriety of the test used. Having set forth the foregoing standard, there can be no rational argument that this Court should review the standard employed. Petitioner's dispute is not with the standard employed, but with the factual determination that no retaliation took place. The determination that Shaheed's discharge was not retaliatory is clearly supported by the record.

Both the EEOC representative and Shaheed were informed of the existence of an investigation into Shaheed's activities on the morning of April 18 prior to Shaheed's making any statements at the EEOC conference on the morning of April 21, 1980. The EEOC employee was specifically advised that the only matter left to be investigated was an interview of Mr. Magyritis and that if Lally confirmed that Mr. Shaheed had reviewed the manifest prior to stating that he was ill, Mr. Shaheed would be terminated.

Shaheed was terminated for reporting sick after reading the manifest on April 18, 1980. In finding that Adam Metal was justified in doubting Shaheed's illness the trial judge relied on the following:

a) A statement by a company employee named Magyaritis that he saw plaintiff look at his manifest, put it down on the table, speak to DeMaio and Muciaccia, who was the receiving clerk, and then leave; Magyaritis' additional statement that DeMaio, who died that weekend, without ever speaking to Lally, to him, that is, told Magyaritis, that plaintiff had told DeMaio that he, the plaintiff, did not want to take the New York City run, and was going to take a sick day.

b) Plaintiff's taking sick days soon after becoming eligible for sick pay.

c) The number of sick days plaintiff had taken up to April 18, 1980 after being warned about early abuse of sick days.

d) The two incidents of plaintiff's arguing with customers as to which plaintiff had a different version of the events than did the customers.

e) The written note of March 13, 1980 memorializing a phone call by a Mr. Lovelidge employed by the defendant to Dr. Panzer which stated that Dr. Panzer was evasive in his answers to questions about plaintiff.

f) Stories attributed to plaintiff about mechanics not fixing his truck. And,

g) Conceivably, plaintiff's testimony at EEOC about cat urine and defication in his truck, although defendant maintains that this came up only after

> plaintiff produced Dr. Panzer's note at the April 24 meeting; even if this testimoney were considered, it does not lead to a conclusion of retaliatory discharge. (11Pa - 12Pa).

After weighing all of the foregoing, the District Court concluded:

> It seems to me that Lally was justified in assessing plaintiff's credibility the way he did and in concluding the plaintiff was not ill on April 18.
>
> On the basis of the finding that plaintiff was not ill, Mr. Lally could conclude, as he did, plaintiff walked off the job and, hence, had refused the company order to take out the load and was therefore subject to immediate discharge.
>
> On the basis of a finding that plaintiff had refused a company order coupled with plaintiff's shabby work record compiled in only eleven months, defendant has demonstrated a legitimate, nonretaliatory reason for plaintiff's discharge. (14Pa).

Contrary to Petitioner's contention, the District Court did not find that Shaheed's statements at the EEOC conference on April 21, 1980, played a role in the decision to terminate his employment. Rather, Judge Meanor found that the incident of April 18, 1980, regarding the refusal of assignment coupled with Shaheed's entire employment record, formed the basis for the discharge decision. In specifically ruling that Adam Metal had rebutted a prima facie case by showing that the discharge of Shaheed had been for cause, Judge Meanor set forth the specific grounds and incidents on which he based his opinion (6Pa - 11Pa). Judge Meanor's

findings were affirmed by the Third Circuit Court of Appeals on May 18, 1983.

Petitioner seems to rest his entire argument on the case of *Pettway v. American Cast Iron Pipe Company*, 411 F.2d 998 (5th Cir. 1969). The facts of the *Pettway* case are clearly distinguishable from the instant action. In *Pettway*, the plaintiff was discharged solely as a result of filing a charge with the EEOC and because of statements made in such charge. The instant case is totally different. Shaheed was not discharged because of his claims to the EEOC. He was discharged because of his actions on April 18, combined with his poor work history. Unlike the plaintiff in *Pettway*, Shaheed has not shown that his termination was based in any part on his charge, or statements made, before the EEOC. The company's response to Shaheed's actions in the workplace were set in motion prior to the statements being made to the EEOC and it is sheer sophistry to try to suggest otherwise. Judge Meanor found that "[d]efendants do not assert, as the defendant did in *Pettway*, that they fired Shaheed for, in essence, the fact of his having made allegations to the EEOC; rather, Shaheed's statements were utilized in connection with his discharge, *if at all*, solely as they bore upon his credibility in an unrelated matter. Thus, it can hardly be said that in relying on Shaheed's statements to make an unrelated credibility determination, defendants retaliated against plaintiff in discharging him" (16Pa, emphasis added).

Petitioner would have this Court believe that the District Court and the Third Circuit found that the use of Petitioner's statements before the EEOC were permissible as part of the discharge decision, thus varying from

the decisional law of the other Circuit Courts of Appeal. However, the District Court's findings are clear on the reasons for the discharge and none of those reasons are related to any statements made before the EEOC.

II. Petitioner Was Afforded A Reasonable Opportunity To Cross-Examine Lally.

The record of the trial of this case is contained in five volumes. Mr. Lally's direct examination covers 46 pages of such record. Mr. Schacter, Petitioner's counsel, conducted his cross-examination of Mr. Lally over 128 pages of the transcript. Mr. Schacter inquired into a number of areas with Mr. Lally, including his knowledge of discrimination laws, Adam Metal's disciplinary policy, Shaheed's job assignment, Alcoa's connections with Adam Metal, Shaheed's conduct as an employee and the discharge of Mr. Shaheed. At the noon recess on March 12, 1982, Mr. Schacter informed Judge Meanor that he would need approximately one hour further to complete the cross-examination of Mr. Lally. Mr. Schacter was informed by Judge Meanor that he would be given that additional hour and that he should conclude his cross-examination in that time period (8RA).

The instant action was tried before Judge Meanor without a jury. Thus, Judge Meanor was responsible for resolving questions of law and of fact. In such situation, the trial judge need not exercise as much restraint in limiting testimony as he might in a criminal case. *Government of Virgin Islands v. Blyden*, 626 F.2d 310 (3rd Cir. 1980). In the Federal courts, the trial judge is expected to be more than a presiding officer. *Faudree v. Iron City Sand & Gravel Company*, 315 F.2d 647 (3rd Cir. 1963).

The amount of cross-examination submitted is left to the sound discretion of the trial court. *Acford v. U.S.*, 282 U.S. 687 (1937), *Thorp v. American Aviation*, 212 F.2d 821 (3rd Cir. 1954). Rule 611(a) of the Federal Rules of Evidence requires the trial court to exercise reasonable control over testimony and to avoid the needless consumption of time. In addition, Rule 403 permits the trial judge to exclude even relevant evidence if he considers it to be a needless presentation of cumulative evidence. Periodically during the cross-examination of Mr. Lally, Judge Meanor inserted his own questions in an effort to clarify his understanding of the facts. Judge Meanor's questions permitted the issues to become more clearly defined. Petitioner's cross-examination of Lally was nearly three times as long as Lally's direct testimony and he had sufficient time to cover whatever relevant areas he wished to cover. In addition, Petitioner had taken the deposition of Lally on January 13, 1982. The transcript of that deposition is 118 pages long and was filed with the court. The deposition covered the incident of April 18 and Lally's reaction to it in depth.

Petitioner cites *Skinner v. Caldwell*, 564 F.2d 1381 (9th Cir. 1977) and *U.S. v. Ketchum*, 420 F.2d 901 (4th Cir. 1969) in his brief in support of his position. Both of these cases deal with a criminal defendant's Sixth Amendment rights and deal with standards not relevant to civil litigation.

Title VII plaintiffs do not have an absolute right of continued cross-examination. Even Petitioner's cited criminal cases recognize that parties do not have the right to excessive cross-examination. *See U.S. v. Winley*, 638 F.2d 560, 563 (2nd Cir. 1981), *Skinner v. Caldwell*,

546 F.2d at 1388. Plaintiff had ample opportunity to cross-examine Lally both at trial and during his deposition. The trial judge believed that continued cross-examination would be merely repetitive and exercised his discretionary powers to limit such examination to the time period estimated necessary by Petitioner's *own* counsel.

III. The Award Of Attorney's Fees To Alcoa Was Not An Abuse Of Discretion.

This Court made the definitive statement regarding the award of attorney's fees to prevailing defendants in Title VII cases in *Christianberg Garment Company v. EEOC*, 434 U.S. 412 (1978). In Christianberg, it was found that "a District Court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon the finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421. Appeals courts have generally deferred to the presiding judge to "balance the equities that are an integral part of the proceeding for an award of attorney's fees." *Mastrippolito & Sons, Inc. v. Joseph*, 692 F.2d 1384 (3rd Cir. 1982). At the trial, Alcoa was awarded attorneys' fees. Alcoa was not named in either of Shaheed's charges with the EEOC, nor was Alcoa made an original defendant in the instant law suit. Lally testified that he made the decision to terminate Shaheed and that the decision was not made by anybody from Alcoa. Lally had been deposed prior to the commencement of the trial. Judge Meanor determined there was no ground to hold Alcoa in the law suit and he dismissed Alcoa at the beginning of the trial.

Petitioner argues that because of the mere fact that Adam Metal's parent, Alcoa, supplied an attorney to Adam Metal to attend the EEOC conference, Alcoa can be charged for the personnel actions of its subsidiary. His argument is ludicrous on its face. There has been no testimony or suggestion that the Alcoa attorney who represented Adam Metal in the capacity of counsel had any responsibility for the employment decision that was made. As a matter of fact, all of the evidence is directly to the contrary.

Petitioner also attempts to argue that an award of attorney's fees is "unfair" because he relied on the advice of his counsel. If Petitioner's argument is accepted, then attorney's fees could never be awarded against any party represented by counsel, a result which would fly in the face of the statutory provision for attorney's fees in Title VII. This clearly is not this Court's intention as set forth in *Christianberg*. The cases cited in Petitioner's petition, *LeGare v. University of Pennsylvania Medical School*, 488 F.Supp. 1280 (E.D. Pa. 1980) and *Little v. Southern Electric Steel Company*, 595 F.2d. 998 (5th Cir. 1979), concern counsels' errors in pleadings. The instant matter is not a question of a counsel's deficiencies in the area of pleadings. This is rather a case which involves Petitioner's individual knowledge that his claim against Alcoa was without merit. Petitioner was deposed prior to trial. The trial court had access to the transcript of this deposition at the time it made its summary judgment in favor of Alcoa and at the time of the award of attorney's fees. Mr. Shaheed testified therein as follows:

Question: While you were working at Adam Metal did you ever meet any employees of Alcoa?

Answer: No, not to my knowledge. I met people but no one specifically said they were from Alcoa.

Question: Did you ever work for Alcoa?

Answer: No.

Question: Did anybody from Alcoa ever discriminate against you to your knowledge?

Question: Mr. Schacter: Objection. Calls for a legal conclusion.

Question: Did anybody from Alcoa ever harrass you?

Answer: I didn't work for Alcoa. I worked for Adam Metal.

Question: I understand that sir and I appreciate that. Has anybody from Alcoa ever harrassed you to your knowledge?

Answer: No.

(Transcript of Deposition of Kahlil T. Shaheed (1/12/82), pages 87 1.17 to 88 1.7).

Neither Petitioner nor his counsel had any rational reason to believe that Alcoa was in any way responsible for Mr. Shaheed's discharge. Petitioner is once again arguing a factual determination, that of Mr. Shaheed's lack of a good faith belief in Alcoa's involvement in his discharge.

CONCLUSION

For all of the reasons set forth above, it is respectfully urged that the Court deny Petitioner's Request for a Writ of Certiorari.

Respectfully Submitted,

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Dated: September 16, 1983

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EXCERPTS FROM THE TRIAL TRANSCRIPT

(Shaheed-Cross) Vol. II, pages 73-75

Q: So at 20 to seven it was still your intention to work the day, and you went into the Adam Metal facility, you determined what run you would have for the day. Is that correct?

A: I looked at my run, yes.

Q: And by looking at your run, you could determine where you were going. Is that correct?

A: Yes.

Q: And that run indicated that you were, in fact, to have the—withdraw that please. That paperwork indicated, in fact, that you were to have the New York run. Is that correct?

A: It was the run that I had been given, the same run I was given all the time.

Q: The New York run?

A: Yes.

Q. And there came a point in time after you entered the facility that you determined that your physical condition did not permit you to work the rest of the day. Is that correct?

A: Yes. Well, on my way to work it was getting—the pain in my back was turning into a burning sensation. It was getting worse, but I was going to go to work anyway.

Q: I see. There came a point in time while you were inside the building that you determined that the

physical problem with your back was too great and that you could not work that day?

A: Yes.

Q: And you notified certain personnel of that fact. Is that correct?

A: Yes.

State of *New Jersey*
County of *Essex* ss:

AFFIDAVIT

I Jack Muciaccia, being first duly sworn upon my oath, hereby state as follows:

I have been given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the government to produce the affidavit in a formal proceeding. Upon the closing of this case, the affidavit may be subject to disclosure only in accordance with Agency policy.

I reside at *271 Crescent Place, Yonkers, NY 10704*
My telephone number is *(914) 776-6129*

I am employed by *Adam Metal Supply Co.*
located at *625 Evans Street, Elizabeth, NY*

(1) I work as a traffic clerk.

(2) I changed Shaheed's run on 4 occasions, in about January and February, 1980. Shaheed told me each time that he felt too nervous to drive into New York City those days. No others ever asked me to change their run. I was reprimanded once by Bob Miller, Operations Manager, in about March, 1980, for changing runs after they've been assigned. He said it was not part of my job to change runs, and the men were complaining.

EXCERPTS FROM NEW JERSEY BOARD OF MEDIATION OPINION

The grievant had established a very poor overall record in the short time in which he was employed by the Company. In coming to a decision to discharge the grievant, the Company stated that it took the grievant's entire record into consideration. The key incident involved in this case occurred on April 18, 1980. The evidence is quite clear that the grievant did not like New York City runs despite his testimony to the contrary.

Testimony by Company witnesses which included a Union driver, established beyond a doubt that the grievant did not like New York City runs. He had complained about these runs and it is clear that on April 18, he first looked at his run which was a New York City run and then decided to get sick enough not to take the run.

All Company witnesses could not be lying and only the grievant telling the truth. Lally testified that someone saw the grievant review his run before he claimed he was sick. Magyaritis, a Union driver, testified that he saw the grievant look at his run and study it, go to the shop steward and then went to the receiving clerk before he left the building. Magyaritis also testified that he spoke to the shop steward who said that the grievant told him he did not like New York City runs and was not going to take the New York City run that day (April 18). Gordon, the Dispatcher, testified that the grievant constantly complained about New York City runs.

All of the above testimony is too overwhelming and shows clearly that the grievant decided on April 18 not to take the New York City runs. The fact that the grievant

has taken other New York City runs is immaterial. His job was to take these runs but he did not like them.

EXCERPTS FROM THE TRIAL TRANSCRIPT

(Lally-direct) Vol. II, page 170

Q: What, if anything else, did you do on Friday, April 18, relevant to Mr. Shaheed's departure from the premises?

A: Well, I called Larry Gilbert, who is the business agent for Local 807 for New York, and asked him if—I gave him a hypothetical case as I understood what happened, that a man came in, punched in, looked at his manifest, then said he was sick and walked out. I said, "Is that grounds for, what you know of it, is that grounds for termination?" And he said, "Yes."

(Lally-direct) Vol. II, pages 177-179

Q: Sir, what was your belief as to why Mr. Shaheed departed from the premises on April 18?

A: I was under the impression that he just—I know he didn't like going to New York, and this was a New York run, and it was a nice, pleasant day, and it was Friday, so that's as good a day as any to take off.

Q: And you were seeking confirmation of what fact?

A: The fact that he reviewed the manifest before he went in and said he was sick or claiming a sick day.

Q: And what significance would that have had to you?

A: Well, according to the teamsters, if you review the manifest, you are, in effect, accepting your work assignment.

Q: I see. Did you obtain confirmation of that fact at any time?

A: I got confirmation of that on the 21st.

Q: When on the 21st?

A: It would have been the late afternoon, 5 o'clock to—may have been 5:30, in that range, when the drivers came back.

. . .

Q: Did you seek to obtain confirmation from anyone on Friday, April 18?

A: Well, I asked the drivers—I normally don't stay late on Friday, so the early drivers that get back on Friday, I asked if they had been the ones who saw this. They said no.

. . .

Q: So that at the time you became aware of the fact that Mr. Shaheed had left the premises, your other drivers had already departed on their various runs. Is that correct?

A: Oh, yes, definitely.

(Lally-direct) Vol. II, pages 18-19

MR. RIZZO: These are the EEOC files and, specifically, 3D is the notes of the EEOC representative that attended the conciliation conference, or I should say, investigation conference on April 21, 1982.

THE COURT: All right, go ahead.

MR. RIZZO: 1980, I'm sorry.

Q: I direct your attention to the last paragraph of those conciliation notes in that exhibit where it reads, "Respondent's attorney" using the abbreviation, "Advised me prior to the conference that CP had refused an assignment." And over the word "assignment," 4/18/1980, "and then left the job stating he was sick. Investigation is underway which may result in suspension and/or discharge."

Sir, do you have any reason to believe that Miss Pinion's statement in her notes that I just read to you is incorrect?

A: No, I have no reason at all not to believe that.

Q: Do you know at what point during the meeting that Miss Pinion was advised of the facts which I just read from, to you from that statement of notes?

A: No, our attorney, Miss Shaw, got together with Miss Pinion before the conference.

Q: What time did the conference start?

A: Somewhere around 9:30, as I recall.

Q: And you refer yesterday during the course of your examination to certain statements that were made by Mr. Shaheed during the course of the examination with respect to a cat situation that existed on the premises. The conversation that you just referred to between Miss Shaw and Miss Pinion, did that conversation take place before or after the plaintiff made the statements with respect to the cat situation?

A: Those situations took place before the conference started.

(Lally-Cross) Vol. III, pages 115-116

THE COURT: All right, we'll stop for lunch and resume at 2:00 o'clock.

How much longer are you going to be with this witness?

MR. SCHACHTER: Your Honor, I don't exactly know, but approximately an hour.

THE COURT: That's all I'm going to give you because—

MR. SCHACHTER: I'll do my best to finish him.

THE COURT: You're going to finish him in an hour.

MR. SCHACHTER: I'll finish my areas of cross-examination.

THE COURT: You organize yourself to finish cross-examination of Mr. Lally in an hour. I've got the right to control the length and duration of the cross-examination and—

MR. SCHACHTER: Your Honor, this is—

THE COURT: The time you've had plus another hour is entirely reasonable.

MR. SCHACHTER: Your Honor, this is a key witness.

THE COURT: Finish with him and quit for the day.